Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

GOLDEN PEANUT COMPANY,

Petitioner,

v.

NEON EARL BASS JR., DRY BRANCH FARMS INC., AND VARNER-BASS ENTERPRISES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court enforce an alleged oral agreement once the court determines that the alleged agreement violates federal law?

CORPORATE DISCLOSURE STATEMENT

Golden Peanut Company ("GPC") is a limited liability company owned in equal shares by three companies: Archer Daniels Midland Co. ("ADM"), Alimenta (USA) Inc. and Cargill Inc. At all times relevant to this suit, however, GPC was a general partnership consisting of ADM, Alimenta and Gold Kist Inc.

One hundred percent of the stock of Alimenta is owned by Algen Holding, B.V. No publicly-held entity owns 10% or more of Gold Kist, Cargill or ADM.

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Petitioner Golden Peanut Company ("GPC") is the largest peanut sheller in the world.[1] At all times relevant to this Petition, Respondents were the largest peanut farmers in the world. GPC bought Respondents' 1990 crop for over $20 million. Four years later, Respondents sued, claiming that they were owed another $20 million under an alleged oral agreement with no set price. Federal statutes and regulations, however, prohibit the sale of so-called "Additional" peanuts without (i) a written contract (ii) that clearly states the "final price to be paid." Accordingly, the Georgia Supreme Court held that Respondents' alleged oral agreement "did not comply" with federal law. Despite this ruling, the Court nevertheless held that Respondents' alleged oral agreement could be enforced. GPC contends that this was error.

OPINIONS BELOW

The opinion of the Georgia Supreme Court that gives rise to this Petition is reported as *Golden Peanut Co. v. Bass*, 275 Ga. 145, 563 S.E.2d 116 (2002). The opinion of the Georgia Court of Appeals, which the Georgia Supreme Court affirmed, is reported as *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001).

STATEMENT OF JURISDICTION

The Georgia Supreme Court rendered its opinion in this matter on April 29, 2002. As set forth below, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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1. A "sheller" buys, shells and grades peanuts from farmers and then sells them to manufacturers.

This Court has jurisdiction over all "final judgments or decrees rendered by the highest court of a State in which a decision could be had" regarding questions of federal law. 28 U.S.C. § 1257(a). A "final judgment" typically is one where nothing remains to be decided by any state court. *See, e.g., Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Here, this case has been remanded for a second trial. This pending retrial, however, does not affect the Court's jurisdiction over GPC's Petition, because this may be the Court's only opportunity to correct a clear and profound error that will affect a wide range of federally-regulated contracts in Georgia.

In the seminal case on § 1257 jurisdiction — a case, like this one, which also involved error by the Georgia Supreme Court — this Court recognized that in certain circumstances it may review a case before all state court action is complete:

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice[.]"

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-78 (1975) (quoting *Radio Station WOW Inc.*, 326 U.S. at 124).

This case, we submit, is governed by the fourth such category set forth in *Cox*:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83. *See also Florida v. Thomas*, 532 U.S. 774, 780 (2001) (same). The issue raised in this Petition satisfies each of these conditions. This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a).

First, no other federal issues exist in this case. Thus, there is no possibility that the pending retrial will raise other issues which may be appealed to this Court. *See Cox Broadcasting Corp.*, 420 U.S. at 477 (allowing interlocutory review only in cases where additional state court action "would not require the decision of other federal questions that might also require review by the Court at a later date").

Second, this Petition represents GPC's only sure chance to bring its sole federal issue before the Court. GPC may very well prevail in the retrial of this case, if, for example, a second jury rejects Respondents' argument that the parties made an oral agreement, or if the jury agrees with GPC that the parties reached an accord and satisfaction as to their entire dispute. *See id.* (allowing jurisdiction even where petitioner "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court").

If, at retrial, GPC prevails on such state law grounds, it will have no way to challenge here the Georgia Supreme Court's ruling that Additional peanuts can be sold under an alleged oral agreement, or that such an alleged agreement is enforceable even though it violates federal law. *See Golden Peanut Co. v. Bass*, 563 S.E.2d 116, 118 (Ga. 2002) (holding that Respondents' alleged oral agreement "did not comply" with federal law). Allowing such a decision to stand will cause enormous upheaval in an industry that brings $2 billion to Georgia each year. Forcing GPC and the Georgia peanut industry to wait for another dispute to arise, and for that dispute to wind its way through discovery, trial, the Georgia Court of Appeals and the Georgia Supreme Court before it can be addressed here would be to compel the very kind of "economic waste and delayed justice" that the *Cox* exceptions are meant to avoid.[2] *Cox Broadcasting Corp.*, 420 U.S. at 478 (quoting *Radio Station WOW Inc.*, 326 U.S. at 124).

If the Court grants GPC's Petition, however, and reverses the decision below, such a reversal would preclude any further litigation as to Respondents' Additional peanuts. If this Court

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2. This case, for example, involves Respondents' 1990 peanut crop and is only reaching this Court 12 years later.

holds that Respondents' alleged oral agreement, which the Georgia Supreme Court has already decided violates federal law, is unenforceable, then this Court's decision would forever preclude Respondents from arguing that they are owed anything more for their Additionals than the $20 million they have already been paid. *See id.* at 482-83 (limiting review to cases in which Supreme Court action will preclude "any further litigation on the relevant cause of action").

Finally, this is a case in which "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* Peanuts are Georgia's second largest cash crop and constitute a $2 billion industry in Georgia alone. *See* Georgia Peanut Commission, "About the Georgia Peanut Commission," <http://www.gapeanuts.com/GPCinformation.html>. Farmers and shellers thus enter into hundreds, if not thousands, of contracts for the sale of Additional peanuts in Georgia each year. Moreover, the requirement that Additional peanuts be sold pursuant only to written contracts that clearly state the "final price" to be paid is absolutely essential to the proper functioning of the federal peanut program as it stood when the contracts at issue were made. Without such a restriction, federal regulators would be unable to ensure that Quota peanuts command higher prices than Additionals, and that American farmers are thus given an incentive to satisfy demand in the domestic market before growing peanuts to be sold overseas. During the relevant time, Congress had declared that ensuring a stable supply of peanuts in this fashion is "imperative . . . to protect producers, handlers, processors and consumers." 7 U.S.C. § 1357 (1990).

The distinction between Quota and Additional peanuts has been abolished as of the 2002 crop year; farmers who own peanut quotas will be bought out by the federal

government over the next five years. *See* Farm Security and Rural Investment Act of 2002 § 1309, 7 U.S.C. § 7959. However, this change will in no way affect the tremendous impact that the decision below will have on the Georgia peanut industry and Georgia's implementation of federal law.

First, claims based on alleged oral contracts in Georgia are subject to a four-year statute of limitations. O.C.G.A. § 9-3-25. Thus, claims under the existing Quota system may still be brought until 2006, and may linger in the courts for up to a decade thereafter. As noted above, this case, for example, involves Respondents' 1990 peanut crop and is only reaching this Court 12 years later.

Second, the decision below has broad and troubling implications for any contract made in Georgia in an industry that is regulated by federal law. The Georgia Supreme Court has held that an alleged oral agreement must be enforced even when it violates the very linchpin of a federal statutory and regulatory scheme. Such a holding casts doubt on the enforcement of any number of federal statues and regulations in Georgia courts and is starkly at odds with such courts' Constitutional duties under the Supremacy Clause. Thus, this is a case in which "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting Corp.*, 420 U.S. at 482-82.

Failure to review the decision below at this stage of the proceedings will, at the very least, subject the parties to years of potentially unnecessary litigation. At worst, it may completely deprive GPC of the ability to appeal its federal claim and will subject Georgia businesses to years of uncertainty as to the binding effect of federal law. Thus, under the standard set by 28 U.S.C. § 1257 and *Cox*, jurisdiction is appropriate in this Court.

RELEVANT STATUTORY AND REGULATORY PROVISIONS INVOLVED

In 1990, when the contracts at issue were made, 7 U.S.C. § 1359(q) provided as follows:

> (q)(1) Handlers may, under such regulations as the Secretary may issue, contract with producers for the purchase of additional peanuts for crushing, export, or both.
>
> (2) Any such contract shall be completed and submitted to the Secretary (or if designated by the Secretary, the area marketing association) for approval before August 1 of the year in which the crop is produced.
>
> (3) Each such contract shall contain the final price to be paid by the handler for the peanuts involved and a specific prohibition against the disposition of such peanuts for domestic edible or seed use.

In 1990, 7 C.F.R. § 1446.107(a)(7) provided in relevant part:

> (a) Submitting contracts for approval. . . . In order to be approved by the county committee, the following information must appear on the contract:
>
> * * *

(7) The final contract price as defined in accordance with § 1446.108 of this subpart to be paid by the handler shown as a set percentage of the loan rate for quota peanuts[.]

In 1990, 7 C.F.R. § 1446.108 provided:

In order for a contract to be approved by the county committee, the contract price shall be:

(a) Expressed in such a manner that a third party may determine the actual price of the peanuts without a need for additional negotiations; and

(b) Set at a level that is not lower than the additional loan rate for the type peanuts involved in the sale.

In 1990, 7 C.F.R. § 1446.71(b) provided:

(b) Limitation of authority. No State and county committee or its employees or representatives, or any association or its employees or representatives may modify or waive any of the provisions of this subpart or any amendment or supplement thereto.

STATEMENT OF THE CASE

The Federal Peanut Program: At all times relevant to this case, virtually every stage in the production and marketing of peanuts, from seed to sale, was regulated by the federal government. *See* 7 U.S.C. § 1281 *et seq.* (1990).[3] Congress had determined that:

> The production, marketing, and processing of peanuts and peanut products employs a large number of persons and is of national interest. . . . [F]luctuation of prices and marketings of peanuts creates an unstable and chaotic condition in the marketing of peanuts . . . *[I]t is imperative that the marketing of peanuts . . . in interstate and foreign commerce be regulated in order to protect producers, handlers, processors, and consumers.*

7 U.S.C. § 1357 (1990) (emphasis added).

The regulation and marketing of peanuts has been extensively regulated. The Secretary of Agriculture annually allocated a limited quantity of unshelled or "farmer stock" peanuts that could be sold for domestic consumption. These were designated as "Quota peanuts" or "Quotas." *See* 7 C.F.R. §§ 998.5(a), 1446.72(gg) (1990). Any peanuts produced beyond this quota were "Additional peanuts" or "Additionals," which had to be exported or crushed for oil. 7 U.S.C. § 1359(q)(1) (1990).

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3. Because the contracts at issue were signed in 1990 and governed the sale of Respondents' 1990 crops, this Petition cites to the statutes and regulations as they existed in that year.

While contracts for the sale of Quotas could be written or oral, the sale of Additional peanuts was far more restricted. Additionals could be sold only by a *written* contract. *See* 7 U.S.C. § 1359(q)(2) (1990); 7 C.F.R. §§ 1446.107(a)(7), 1446.107(a)(12), 1446.108(a) (1990). "Each such contract *shall* contain the final price to be paid by the handler [*i.e.*, the sheller]." 7 U.S.C. § 1359(q)(3) (1990) (emphasis added). This written contract "must" contain both the "final contract price" and "[a] prohibition on changing the price." 7 C.F.R. § 1446.107(a)(7), (12) (1990). If the final price was to be determined by a formula, then it "*shall* be . . . [e]xpressed in such a manner that a *third party* may determine . . . the *actual* price of the peanuts *without a need for additional negotiations.*" 7 C.F.R. § 1446.108(a) (1990) (emphasis added).

Additionally, each contract for Additional peanuts had to be submitted to the Agricultural Stabilization and Conservation Service ("ASCS"), an arm of the Department of Agriculture, for approval by a federally-designated "contract cutoff date," which in this case was July 31, 1990. *See* 7 C.F.R. §§ 1446.72(e), 1446.107(a) (1990).[4] Thus, after the contract

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4. Respondents have been quick to point out that the 55 written contracts at issue here were, in fact, approved by local ASCS committees. This fact is irrelevant to GPC's Petition, however, for two reasons. First, approval of the parties' *written* contracts in no way constitutes approval of an alleged oral agreement that was not even hinted at in the written contracts — and of which the ASCS committees thus were wholly unaware. And second, the county committees could not approve an oral agreement for the sale of Additional peanuts even if they had wanted to. Federal regulations expressly stated that county committees could not waive any part of the peanut program. *See* 7 C.F.R. § 1446.71 (1990) ("Limitation of Authority"). The county committees thus did not and could not waive either the "final price" or the writing requirements imposed by federal law.

cutoff date, there was no true "market" for Additional peanuts. If Additionals were not sold by written contracts approved by the cutoff date, they were required to be placed into a government loan program. 7 C.F.R. § 1446.70(a)(2) (1990).

Respondents' 1990 Contracts: In the Spring of 1990, after several months of negotiations, the parties executed 55 written contracts, one for each of Respondents' farms. GPC did not prepare the contracts, but instead provided Respondents with blank, preprinted forms. Respondents completed each of the forms. With regard to their Additionals, Respondents filled in the quantity and price terms next to the words "Firm Priced" and typed in the words "Floor Price," as follows:

PRODUCER HEREBY AGREES TO SELL & DELIVER TO GOLDEN AND GOLDEN HEREBY AGREES TO BUY FROM PRODUCER, SUBJECT TO THE TERMS AND CONDITIONS OF THIS CONTRACT, THE FOLLOWING FARMER STOCK PEANUTS BY TYPE PRODUCED ON THE ABOVE SPECIFIED FARM.

ADDITIONAL PEANUTS (Seg I)	Quantity (lbs.)	Price (% of 1990 Quota Support)
1. Firm Priced FLOOR PRICE	138,469 lbs.	63.0 % $ 401.00 Per Ton
2. Firm Priced	lbs.	% $ Per Ton
3. Formula Price	lbs.	See Addendum to this contract for Final Price Determination

PX1-55 (T1889-2152).

All witnesses, including Respondents' experts, testified that the term "floor price" simply means "minimum price," and they agreed that there is no industry custom as to how any higher, final price will be determined. T204, 211, 231-33, 246, 272-73, 367-68, 586-87, 623, 706-07, 881, 985, 987. The parties' contracts do not state how to reach any price other than the ones that Respondents specified on the contracts themselves. However, the parties did agree that their written contract "constitutes the *complete and exclusive agreement* between the Handler [GPC] and Producer

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[Respondents]" and that *"No parol evidence shall be relevant to supplement or explain this agreement."* T1889-2152 ("Terms and Conditions," No. 1) (emphasis added).

The principals of the corporate Respondents, John Varner and Neon Earl Bass Jr., offered evolving and inconsistent accounts of how the parties supposedly intended to reach a final price. T391-93, 410, 880-82, 887-88.[5] Ultimately, Respondents did not seek to recover based on any prices actually paid by GPC or any other Georgia sheller, nor on any of the many contradictory methods that they previously contended were applicable. T1112-19. Instead, Respondents "proved" their price at trial by having their experts work backwards from bids for shelled peanuts in the Netherlands — a method that Respondents unequivocally admitted the parties had *not* agreed to. T885-86, 890. Respondents also offered an alternative measure based on prices available through a government loan program. T1038-44, 1085-89, 1109-23. Notably, Respondents did not seek any final price stated in the parties' written contracts that a third party could determine without the need for additional negotiations. *Cf.* 7 C.F.R. § 1446.108(a) (1990).

The Judgment: Four years after GPC paid them $20 million for their 1990 crop — and without a word of complaint in those intervening years — Respondents brought

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5. Among other things, Respondents contended that: (1) they were owed GPC's highest daily market price for *Quota peanuts* — $1,230/ton — for both their Quotas *and* Additionals (T391-93); (2) the parties simply agreed to determine "a mutually acceptable price" later in the year (T880); (3) Respondents could "lock-in" some price on any day before December 15, 1990 (T887-88); and (4) GPC would supply a price for the Additionals based on some unspecified formula that GPC supposedly used (T410).

suit seeking over $20 million more. After a two-week trial in August 1999, a jury rendered a $22 million verdict for Respondents, and the trial court entered judgment thereon. Over $17 million of that judgment was for Additionals, pursuant to the purely oral agreement that Respondents allege.

Preservation of Error: GPC first raised the federal issue presented here in a motion for summary judgment. At trial, GPC again raised the issue in the form of a motion for directed verdict and then for j.n.o.v. *See* T1165-67, T2133. Thereafter, the issue was argued before and decided by both the Georgia Court of Appeals and the Georgia Supreme Court, as discussed below.

Appeal: On appeal, the Georgia Court of Appeals erroneously held that federal law would not bar Respondents from enforcing an alleged oral agreement for their Additionals. Thereafter, the Supreme Court of Georgia held that Respondents' alleged "floor price" agreement violated federal law.[6] *Golden Peanut Co. v. Bass*, 563 S.E.2d at 118. Despite unequivocally holding that Respondents' alleged agreement

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6. The Supreme Court erroneously contended that Respondents' "deficient agreements were memorialized on a form prepared by Golden Peanut." *Golden Peanut Co. v. Bass*, 563 S.E.2d at 119. As an initial matter, GPC provided only blank forms, which *Respondents* filled out. Further, nowhere on *any* of the 55 contracts is Respondents' alleged oral agreement memorialized. GPC in no way is attempting to repudiate the parties' agreement set forth *as written* in the contracts; indeed, GPC paid Respondents over $20 million dollars under those written contracts. However, GPC asserts here, as it did below, that Respondents' alleged oral agreement — which is *not* contained in any of the contracts and whose terms Respondents themselves cannot seem to agree upon — violates federal law and federal public policy and, therefore, is unenforceable.

violated federal law, the Georgia Supreme Court held that "any deficiency in the form of the agreements is not such as to render them illegal and unenforceable." *Id.* at 119.

REASONS FOR GRANTING THE WRIT

I. Respondents' Alleged Oral Agreement Violates Federal Law and Federal Public Policy.

Federal law allows Additional peanuts to be sold only by a written contract that clearly states the final price to be paid. *See* 7 U.S.C. § 1359(g)(2), (3) (1990). These restrictions are fundamental, not incidental, to the regulatory scheme at issue. The federal peanut program in place at the time deliberately distinguished between the level of contractual formality necessary to sell Quota and Additional peanuts. They not only required a writing for the latter, but rigidly specified the content of that writing and required it to be approved by a date certain. Thus, it was crucial under the the federal peanut program not merely that the parties agree on a price for Additional peanuts, but that their agreement be memorialized publicly in a form that could not be changed later and which a third party could verify independently of the parties' say-so after the fact. 7 C.F.R. §§ 1446.107(a)(7), (12) and 1446.108(a) (1990).[7]

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7. Contrary to their assertion, Respondents' alleged oral agreement would not be enforceable *even if it had been recorded in writing by the deadline*. Even if Respondents had said in writing that they could pick a price by some unspecified means on any date they chose, this still would not have stated a "final price" in such a way that a third party could determine what it was without the need for additional negotiations. *Cf.* 7 C.F.R. § 1446.108 (1990).

Without question, the alleged oral agreement that Respondents advance did not satisfy these requirements. Consequently, and as conceded by the Georgia Supreme Court, Respondents' alleged oral agreement violates federal law. In addition, the alleged agreement violates the federal public policy set forth in 7 U.S.C. § 1357 (1990).[8]

II. The Georgia Supreme Court Erred in Failing to Hold that a Contract that Violates Federal Law and Federal Public Policy Is Illegal and Unenforceable.

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. *Where the enforcement of private agreements would be violative of that policy, it is the* ***obligation*** *of courts to refrain from such exertions of judicial power.*

Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (emphasis added). Federal regulations have the same effect as other sources of

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8. Perhaps the best illustration of the extent to which Georgia courts have misapplied federal law comes from the Georgia Court of Appeals' decision in this case. There the court held that Respondents could even recover in *quantum meruit* for their Additional peanuts. *Golden Peanut v. Bass*, 547 S.E.2d 637, 649 (Ga. App. 2001), aff'd 563 S.E.2d 116 (Ga. 2002). Such a holding is completely at odds with the statutory and regulatory requirements discussed above. Yet, because the Court of Appeals' decision was affirmed by the Georgia Supreme Court, Georgia law now allows farmers to recover for their Additional peanuts without any contract at all. If carried into other areas, such reasoning would wreak havoc with the enforcement of federal contract requirements in this State.

federal law. *See, e.g., Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557, 559 (N.D. Ga. 1980).

This case falls squarely within the rule cited above. It is unreasonable to suggest that, when Congress mandated that contracts for the sale of Additionals "*shall* contain the final price"[9] and the Department of Agriculture required that the "final contract price" and "[a] prohibition against changing the price" "*must* appear on the contract,"[10] they contemplated that contracts need not comply with these requirements to be enforced.

Further, Congress expressly codified the peanut program's policy goals in 7 U.S.C. § 1357 (1990) when it found that the program was in the "*national interest*" and "*imperative* . . . to protect producers, handlers, processors, and consumers." 7 U.S.C. § 1357 (1990) (emphasis added). Congress' findings gave rise to the series of statutes and regulations described above that, among other things, limit the quantities of peanuts that could be sold at market prices determined after the contract cutoff date. Allowing Additionals to be marketed under some ill-defined, alleged oral agreement to pay a supposed "market price" on any date of a party's choosing would circumvent this extensive federal regulatory scheme and run afoul of then-applicable law. The Georgia Supreme Court expressly recognized this fact when it held that Respondents' alleged oral agreement "did not comply" with federal law. *Golden Peanut Co. v. Bass*, 563 S.E.2d at 118. As a result, this alleged agreement cannot be enforced — regardless of whether Congress expressly declared it void.

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9. 7 U.S.C. § 1359(q)(3) (1990) (emphasis added).

10. 7 C.F.R. § 1446.107(a)(7), (12) (1990) (emphasis added).

Federal courts will not enforce contracts that violate federal laws that were designed to protect the public. As this court observed in *Kaiser Steel*, "[t]here is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982); *see also Fomby-Denson v. Dept. of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) ("as a matter of contract law," federal courts will not enforce agreements that violate federal law and public policy).

Similarly, in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), this Court held that a contract that violated a statute prohibiting the government from contracting with private consultants who have certain conflicts of interest was not enforceable, even though the statute "does not specifically provide for the invalidation of contracts that are made in violation of the statutory prohibition." 364 U.S. at 563. Because the principal purpose of the statute was to "protect the public" from the effects of the prohibited contracts, the Court held that contracts in violation of the statute could not be enforced. *Id.* That precise rationale applies to the statutory scheme at issue here, which was intended to protect the public and all peanut program participants, not just the contracting parties. *See* 7 U.S.C. § 1357 (1990) (stating that the relevant restrictions were "imperative . . . to protect producers, handlers, processors, and consumers"). [11]

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11. The Georgia Supreme Court cited *Kelly v. Kosuga*, 358 U.S. 516 (1959) and *Bruce's Juices, Inc. v. Am. Can Co.*, 330 U.S. 743 (1947) to support its ruling that, while Respondents' alleged oral agreement violated federal law, they nonetheless were enforceable. *Golden Peanut Co. v. Bass*, 563 S.E.2d at 118. However, as observed

(Cont'd)

This rule is no different where Congress "merely" punishes violators with a fine, rather than expressly declaring their contracts void.[12] As this Court stated in *Mississippi Valley*, contracts that violate statutes meant to protect the public are unenforceable *notwithstanding the availability of penalties against the violator.* 364 U.S. at 563. Further, while there were substantial penalties for violation of the antitrust and labor laws at issue in *Kaiser Steel*, the existence of such penalties did not cause this Court to find that the contracts in that case were enforceable. 455 U.S. at 77-83. Thus, setting a penalty for those who make a contract that violates federal law — even a substantial penalty — does not make an illegal contract enforceable. Rather, it simply provides further incentive not to enter into such a contract in the first place.[13]

(Cont'd)

in *Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288, 291 (1st Cir. 1988), "the precedential value of these holdings has been limited by two subsequent Supreme Court cases" — *Mississippi Valley* and *Kaiser Steel Corp. v. Mullins* — on which this Court should rely.

12. The sale of Additionals pursuant to anything other than a written contract stating either their final price or a formula from which it can be determined subjects the parties to a penalty per ton of 140% of that year's Quota support price. 7 U.S.C. §§ 1359(m)(1)(A), 1359(m)(1)(C), 1359(q)(3) (1990); 7 C.F.R. §§ 1446.144(b), 1446.108(a) (1990). The buyer collects this penalty from the seller — in this case, from the Respondents. *See* 7 U.S.C. § 1359(m)(2) (1990); 7 C.F.R. § 1446.81(a) (1990). If the buyer fails to collect this fine from the seller, the two are held jointly and severally liable for it. 7 U.S.C. § 1359(m)(3) (1990). Thus, the opinion below, if upheld, may subject the parties to a fine of nearly $20 million. T205.

13. The Georgia Supreme Court also relied upon *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d

(Cont'd)

(Cont'd)

265 (7th Cir. 1986) (*"NIPSCO"*). Unlike this case, *NIPSCO* involved a lawful contract, allegedly tainted by the *collateral* conduct of one party. Here, there is nothing lawful about an indefinite and allegedly oral agreement to sell Additional peanuts. Moreover, the violation involved in such a scheme is not collateral, but rather goes to the very heart of the federal peanut program in effect at the time.

Further, if this Court were to find, as the *NIPSCO* court's dicta holds, that "the defense of illegality, being in character if not origins an equitable and remedial doctrine, is not automatic but requires . . . a comparison of the pros and cons of enforcement," *id.* at 273, Respondents' alleged oral agreement still should be held unenforceable. As explained above, the price-later scheme that Respondents allege is flatly prohibited by federal law. The Department of Agriculture decreed that the provisions of the peanut program, such as the writing and final price requirements, could not be waived. *See* 7. C.F.R. § 1446.71 (1990). And applicable federal public policy, which is expressly stated in a *statute*, likewise demands that the peanut program provisions be strictly enforced. *See* 7 U.S.C. § 1357 (1990). Thus, enforcement of Respondents' alleged oral price-later scheme would violate federal statutes, federal regulations and federal public policy.

Leaving the parties as they are, on the other hand, will not enable GPC to " 'get[] other people's property for nothing . . .' " *Golden Peanut Co. v. Bass*, 563 S.E.2d at 119 (quoting *Kelly,* 358 U.S. at 520-21). GPC has already paid Respondents over *$20 million* for their peanuts, or, per pound, as much (if not more) than it paid to other growers. Even under the balancing test proposed in *NIPSCO*, then, the pros of enforcing Respondents' alleged oral agreement are far outweighed by the cons.

III. The Georgia Supreme Court's Enforcement of Respondents' Unlawful Alleged Oral Agreement Was Contrary to U.S. Constitutional Law.

By holding that an alleged oral agreement to sell Additional peanuts may be enforced despite clear federal law to the contrary, the Georgia Supreme Court committed an error of constitutional magnitude. Article VI of the U.S. Constitution provides that "the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. IV, cl. 2. Just as the Georgia legislature cannot enact a statute providing that Additional peanuts may be sold pursuant to oral contracts or pursuant to contracts that do not meet the various requirements imposed by federal law, *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982), a Georgia court cannot enforce an alleged agreement that violates federal law and federal public policy.

CONCLUSION

Respondents' alleged oral agreement violates the very linchpin of the federal peanut program at the time. The key to that program was the distinction between Quota and Additional peanuts. A crucial difference between the two was the way in which they could be sold: Quota peanuts could be sold at any time, with a contract that was either written or oral. Additionals could be sold only with a written contract, and that contract had to state the peanuts' "final price" in such a way that a third party could determine what it was "without the need for additional negotiations."

The parties' 55 written contracts comply with these rules, and GPC paid Respondents $20 million thereunder. Respondents' alleged oral agreement, however, is plainly illegal. A supposed agreement to let a seller pick a price for his Additionals by a totally unspecified means, and on any date of his choosing, does not in any way state a "final price" in writing such that a third party can verify what it is "without the need for additional negotiations." The Georgia Supreme Court thus was correct in holding that such a supposed agreement "did not comply" with federal law. As a result, the alleged agreement should have been held unenforceable as a matter of law.

This case will continue to govern disputes in a $2 billion industry for many years to come. More important, it has grave implications for the enforcement in Georgia of any contract in an industry that is regulated by federal law. State courts should not be permitted to hold that an alleged oral agreement clearly violates federal law, yet decide in the very same opinion that such an agreement should be enforced nonetheless. Nor should they be permitted to justify such action by branding as merely "incidental" a violation that goes to the very heart of the relevant statutory and regulatory scheme. The opinion below renders the terms "must" and "shall" a nullity.[14] State courts may not supplant clear Congressional and agency intent in this way.

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14. *See, e.g.*, 7 U.S.C. § 1359(q)(3) (1990) ("Each such contract *shall* contain the final price to be paid"); 7 C.F.R. § 1446.107(a)(7) (1990) ("the following information *must* appear on the contract"); 7 C.F.R. § 1446.108 (1990) ("the contract price *shall* be (a) expressed in such a manner that a third party may determine the actual price of the peanuts without the need for additional negotiations").

Given the enormity of the error below and the broad, immediate impact that it will have, GPC respectfully prays that its Petition be granted and that the decision of the Georgia Supreme Court be reversed.

Respectfully submitted this 29th day of July, 2002.

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA DATED APRIL 29, 2002

IN THE SUPREME COURT OF GEORGIA

Date: APR 29, 2002

S01G1157. GOLDEN PEANUT COMPANY v. BASS et al.

CARLEY, Justice.

Golden Peanut Company (Golden Peanut) is a "sheller" engaged in the business of purchasing peanuts. Neon Earl Bass, Jr., Dry Branch Farms, Inc. and Varner-Bass Enterprises (Plaintiffs) are farmers who agreed to sell peanuts to Golden Peanut. When a dispute arose over payment, Plaintiffs brought suit. Golden Peanut answered and raised, among its other defenses, the illegality of the sales contracts. At trial, both Golden Peanut and Plaintiffs introduced parol evidence in support of their contentions. The jury returned a verdict in favor of Plaintiffs. The Court of Appeals reversed based upon the trial court's failure to give a requested charge on accord and satisfaction. However, the court rejected Golden Peanut's claims that the contracts were illegal and its contention that Plaintiffs' parol evidence was inadmissible. *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 237-240 (4, 5) (547 SE2d 637) (2001). We granted Golden Peanut's petition for certiorari to review those two holdings of the Court of Appeals.

1. Golden Peanut contends that the contracts failed to comply with applicable federal statutory and regulatory authority because a final price for Plaintiffs' peanuts was not specified. Instead, the agreement was to pay a "floor price" for the peanuts, with an "understanding that a final price could

be 'lock(ed) in' later in the year. . . . The prescribed method for 'locking in' the actual price would be slightly different for quota peanuts and for additional peanuts." *Golden Peanut Co. v. Bass*, supra at 225. As the Court of Appeals noted, the federal statutes and regulations in force at the time specified that an agreement should contain certain provisions, including "the final contract price" and an express prohibition against changing that price. *Golden Peanut Co. v. Bass*, supra at 237(4). Because Golden Peanut's contracts with Plaintiffs did not include those provisions, they did not comply with that federal authority. However, the decisive question is whether that failure renders the agreements illegal so that Golden Peanut's promise to pay Plaintiffs according to the formula established by parol evidence is unenforceable. "[I]llegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77(II) (102 SC 851, 70 LE2d 833) (1982).

In federal law, illegality as a purchaser's contractual defense to a seller's claim for payment is not favored, " 'and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions.' " *Kelly v. Kosuga*, 358 U.S. 516, 519 (102 SC 851, 70 LE2d 833) (1959) (violation of the Sherman Antitrust Act). Application of that defense

> is not automatic but requires . . . a comparison of the pros and cons of enforcement. [Cits.]. . . . The benefits of enforcing the tainted contract — benefits that lie in creating stability in contract relations and preserving reasonable expectations — must be compared with the costs in forgoing

> the additional deterrence of behavior forbidden by statute that is brought about by refusing to let the violator enforce the contract.

Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F2d 265, 273(2) (7th Cir. 1986) (violation of the Mineral Lands Leasing Act). An agreement for the purchase of peanuts is not inherently illegal. Compare *Kaiser Steel Corp. v. Mullins*, supra (collective-bargaining agreement violative of anti-trust laws).

> [W]hen the contract sued upon is not intrinsically illegal, the [Supreme] Court [of the United States] has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of [federal law] not inhering in the particular contract. . . .

Bruce's Juices v. Amer. Can Co., 330 U.S. 743, 755 (67 SC 1015, 91 LE2d 1219) (1947) (violation of the Robinson-Patman Act). The statutes and regulations upon which Golden Peanut relies relate only to the express terms that a contract to sell peanuts must contain in order to satisfy federal requirements, and do not bar a recovery against the purchaser who enters into an agreement to buy peanuts which does not comply fully with those requirements. See *Bruce's Juices v. Amer. Can. Co.*, supra at 750-751. Moreover, the allegedly deficient agreements were memorialized on a form prepared by Golden Peanut."The words 'floor price' were typed next to the term 'firm price' on each of the form contracts. [Cit.]" *Golden Peanut Co. v. Bass*, supra at 225. To hold that those contracts are illegal and unenforceable against Golden Peanut

would appear to violate the "general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.' [Cit.]" *Kelly v. Kosuga*, supra at 520-521.

> "If the contract be executed, . . ., that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract; for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." [Cits.]

Daniels v. Tearney, 102 U.S. 415, 421 (26 LE 187) (1880).

"Applied too strictly, the doctrine that makes the unenforceability of a contract an additional remedy for the violation of a statute can produce a disproportionately severe sanction. . . ." *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, supra at 273(2). Applying the federal balancing test to the circumstances in this case, we conclude that the Court of Appeals correctly held that any deficiency in the form of the agreements is not such as to render them illegal and unenforceable against Golden Peanut. See *Kelly v. Kosuga*, supra; *Bruce's Juices v. Amer. Can Co.*, supra.

2. Golden Peanut further contends that the contracts are illegal and unenforceable under Georgia law. However, only federal statutory and regulatory authority mandates that a contract for the sale of peanuts specify the final price. In this state, only certain agreements are required to be in

writing. OCGA § 13-5-30. Thus, as a general rule, "[a]n oral contract is legal and may be enforced by an action at law. [Cits.]" *Venable v. Block*, 138 Ga. App. 215, 217(2) (225 SE2d 755) (1976)." 'When a contract is not wholly in writing, but is partly in writing and partly in parol, the entire contract is considered as one in parol.' [Cit.]" *Jankowski v. Taylor, Bishop & Lee*, 154 Ga. App. 752, 754-755(2) (269 SE2d 871) (1980). Therefore, a party to a contract which is not fully in writing may have a viable statute of frauds defense, but cannot defend on the ground that the agreement is an illegal contract simply because it is partially in parol. The contracts for the sale of peanuts at issue in this case are neither illegal under the law of Georgia nor in contravention of its public policy. OCGA §§ 13-8-1, 13-8-2.

3. Golden Peanut correctly notes that, in addressing the parol evidence issue, the Court of Appeals erroneously cited the general contract provisions of OCGA § 13-2-2(1), rather than the specific sales provisions of OCGA § 11-2-202. See *Golden Peanut Co. v. Hunt*, 203 Ga. App. 469, 470(2) (416 SE2d 896) (1992). In the trial court, however, Golden Peanut did not object to Plaintiffs' parol evidence under either statute. Therefore, admission of that evidence would not be reversible error regardless of which provision the Court of Appeals relied upon. *Franklin v. Towe*, 233 Ga. 950(3) (213 SE2d 892) (1975). Moreover, OCGA § 11-2-202

> was meant to liberalize the common law parol evidence rule to allow evidence of agreements outside the contract, without a prerequisite finding that the contract was ambiguous. In addition, the section requires contracts to be interpreted in

> light of the commercial context in which they were written and not by the rules of legal construction. [Cits.]

Southern Concrete Services v. Mableton Contractors, 407 FSupp 581, 582-583 (N. Ga. 1975), aff'd 569 F2d 1154 (5th Cir. 1978). Thus, any parol evidence admissible under the stricter standards of OCGA § 13-2-2(1) presumably would be admissible under the more liberal provisions of OCGA § 11-2-202.

Under the less restrictive terms of OCGA § 11-2-202, a written sales contract

> may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but *may be explained or supplemented*: (a) By course of dealing or usage of trade ([cit.]) or by course of performance ([cit.]); and (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (Emphasis supplied.)

The contracts expressly provide for a "floor price." Parol evidence was clearly admissible under OCGA § 11-2-202(a) to explain the meaning of that term. See *Warren's Kiddie Shoppe v. Casual Slacks*, 120 Ga. App. 578, 579(1) (171 SE2d 643) (1969)."Witnesses for both sides testified that a floor price is simply a minimum price." *Golden Peanut Co. v. Bass*, supra at 225. The agreements thus show, on their face,

that the final price for the peanuts was not expressed therein. Thus, the written contracts were not intended by the parties as a complete and exclusive statement of the agreed upon terms, because only a floor price, rather than the final sales price, was stated. Consequently, parol evidence as to the parties' prescribed method for fixing the final price would be admissible under OCGA § 11-2-202(b) as a consistent and necessary additional term. See *Atlanta Army & Navy Store v. Stuckman*, 143 Ga. App. 850(1) (240 SE2d 220) (1977). Compare *Golden Peanut Co. v. Hunt*, supra at 470(2) (parol evidence inadmissible to contradict agreement and to supply additional uncontemplated terms).

Golden Peanut nevertheless urges that Plaintiffs' parol evidence was inadmissible because the agreements also contain a merger clause. According to that provision, the written contract was the complete agreement between the parties, and parol evidence should not be necessary to supplement or explain it. The pre-printed merger clause would be consistent with a contract which contained a firm sales price. Here, however, the term "floor price" had been typed next to "firm price" on the form agreements. The merger clause is inconsistent with this contractual specification of only a minimum, rather than the final, price. To give effect to that provision would negate the existence of an enforceable contract by precluding introduction of parol evidence regarding the essential final price term."Normally, a contract with inconsistent provisions should be interpreted so that the construction which upholds the contract is preferred. [Cits.]" *Diggs v. Swift Loan & Finance Co.*, 154 Ga. App. 389, 390 (268 SE2d 433) (1980). Moreover, "[t]he intention of the

parties controls and 'should be given effect regardless of mere literal repugnancies in different clauses of the (agreement)' [Cit.]" *Benedict v. Snead*, 271 Ga. 585, 586 (519 SE2d 905) (1999). The parties' intention to enter into contracts in which the final price would not be locked in until a later time was clear. As previously noted, parol evidence of the method for determining the final price would be admissible under OCGA § 11-2-202(b), because the four corners of the document were not intended to set forth a complete and exclusive statement of the terms."The type of evidence which may be admitted under subsection (b) deals with agreements covering matters not dealt with in the written contract. [Cits.]" *Southern Concrete Services v. Mableton Contractors*, supra at 585(II).

> Viewing the contract as a whole, where there are conflicting provisions, "(t)he clause contributing most essentially to the contract is entitled to the greater consideration. . . ." [Cit.] "A subsidiary provision should be so interpreted as not to be in conflict with what clearly appears to be the 'dominant purpose' of the contract." [Cit.]

Joseph Camacho Assoc. v. Millard, 169 Ga. App. 937, 938(1)(a) (315 SE2d 478) (1984). The parties' expressed intent to contract for the sale of peanuts at a final price to be determined later according to an easily applied formula necessarily contemplates an additional understanding as to the establishment of that missing term, and that contractual intent will control over any inconsistent pre-printed merger clause. Although the Court of Appeals mistakenly relied upon OCGA § 13-2-2(1) in its analysis, the holding that Plaintiffs' parol evidence was admissible is affirmed under the right for any reason principle.

Appendix A

Judgment affirmed. Fletcher, C.J., Sears, P.J., Benham, Hunstein and Thompson, JJ., and Judge Constance Russell concur. Hines, J., not participating.

APPENDIX B — OPINION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DATED MARCH 30, 2001 AND APRIL 13, 2001

COURT OF APPEALS OF THE STATE OF GEORGIA

APR 13, 2001

The Court of Appeals hereby passes the following order:

A00A2362. GOLDEN PEANUT COMPANY v. NEON EARL BASS, JR. et al.

The appellant's motion for reconsideration in the above-referenced appeal is hereby DENIED. However, the attached opinion is substituted for the original opinion.

The appellee's motion for reconsideration is also hereby DENIED. First, contrary to the appellees' argument, we conclude that it is possible that a jury could infer from the evidence that the $900,000 payment at issue was conditioned upon the appellees' acceptance of the amount tendered as an accord to satisfy the dispute over the prices of the quota peanuts *and* the additional peanuts. Second, we disagree with the appellees' argument that we should reverse and remand for a new trial only on the issue of liability and not on the issue of damages. We will not remand for retrial on liability while keeping the first jury's decision on unliquidated damages in tact. Compare *BankSouth, N.A. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432 (419 SE2d 522) (1992) (remanded for retrial on liability for liquidated damages).

Appendix B

COURT OF APPEALS
OF THE STATE OF GEORGIA

March 30, 2001

A00A2362. GOLDEN PEANUT COMPANY v. NEON EARL BASS, JR. et al.

MIKELL, Judge.

Golden Peanut Company ("Golden Peanut") appeals a judgment in favor of Neon Earl Bass, Jr., Dry Branch Farms, Inc., and Varner-Bass Enterprises ("plaintiffs") on a breach of contract claim. Following a two-week trial, the jury returned a large verdict in favor of the plaintiffs. The trial court denied Golden Peanut's motions for directed verdict and j.n.o.v. the verdict, and this appeal followed. Because the trial court committed harmful error in refusing to give Golden Peanut's requested jury charge on accord and satisfaction, we reverse.

This case involves contracts for the sale of unshelled peanuts. Golden Peanut is a "sheller," and plaintiffs are peanut farmers. It is undisputed that under federal regulations, each farm is assigned a limited quantity of "quota peanuts" that may be sold for domestic consumption. All peanuts produced in excess of the quota are labeled "additional peanuts," which generally must be exported or crushed for oil. Contracts for the sale of additional peanuts are subject to regulation and must be approved by a federal agency. 7 C.F.R. § 1446.107(a) (1990).

Appendix B

At issue in this case are contracts for the sale of plaintiffs' 1990 crops to Golden Peanut. Viewed in the light most favorable to upholding the jury's verdict, the evidence adduced at trial demonstrates that Golden Peanut agreed to pay a "floor price" for plaintiffs' quota peanuts and additional peanuts, with the understanding that a final price could be "lock[ed] in" later in the year. Witnesses for both sides testified that a floor price is simply a minimum price. The parties reduced their agreement to writing in April 1990, when they signed fifty-five contracts, one contract for each individual peanut farm. The words "floor price" were typed next to the term "firm price" on each of the form contracts. See *Estate of Sam Farkas, Inc. v. Clark*, 238 Ga. App. 115, 120(2) (517 SE2d 826) (1999) (terms added to a contract prevail over terms in a pre-printed form). See also OCGA § 13-2-2(7) ("When a contract is partly printed and partly written, the latter part is entitled to most consideration"). The contracts were approved by the local Agriculture Stabilization & Conservation Service ("ASCS") office in each of the counties where plaintiffs' farms were located.

After the contracts were signed, each party partially performed their contractual obligations. For example, as the peanuts were harvested on each of the plaintiffs' fifty-five farms, they were delivered to Golden Peanut to be processed for resale. Upon each delivery, Golden Peanut paid the plaintiffs at the following rate: (1) for quota peanuts, the plaintiffs were paid the higher of the agreed upon floor price of $675 per ton or the market "spot" price for that particular day; and (2) for additional peanuts, they were paid the floor price of $401 or $440 per ton, depending on the type of peanut.

Appendix B

The deliveries and payments continued into the Fall of 1990. Meanwhile, the parties negotiated regarding the final prices of the quota peanuts and additional peanuts.

The prescribed method for "locking in" the actual price would be slightly different for quota peanuts and for additional peanuts. For quota peanuts, the plaintiffs had the right to designate as the sale price for all deliveries during the crop year Golden Peanut's "spot price" on whatever date the plaintiffs wished to "lock in" a price. The parties anticipated that the "spot prices" would rise as the harvest continued and the effects of the drought were felt. As to additional peanuts, the plaintiffs' evidence was that they could "lock in" a price by reference to the "market price" on the date of their choosing.

The parties were unable to agree on the final prices. In mid-October, after a series of unsuccessful negotiations, Gaylord Coan, the president of Golden Peanut, unilaterally made what he deemed to be a final offer to pay plaintiffs $875 per ton for all quota peanuts and the previously agreed upon floor price for additional peanuts ($401 or $440 per ton, depending on the type of peanut). Immediately following Coan's offer, Golden Peanut sent plaintiffs a payment of approximately $900,000 which brought the amount that had previously been paid for quota peanuts to $875 per ton. The payment was accompanied by the "Varner-Bass Settlement Report," which was a spreadsheet showing the calculation of the offered price for the quota peanuts. Plaintiffs accepted and negotiated the payment. Golden Peanut continued to pay plaintiffs $875 per ton for each subsequent delivery of quota peanuts and the floor price of

$401 or $440 per ton for additional peanuts. Plaintiffs accepted the payments and never attempted to "lock in" a different price in accordance with the procedure regarding "spot prices," "market prices," and Rotterdam prices, etc. It is undisputed that plaintiffs never complained to Golden Peanut about the amount paid for the 1990 crops during the period between November 5, 1990, and the filing of this lawsuit in 1994. The plaintiffs explained that Golden Peanut had prevented them from "locking in" a price by its unilateral actions in October and that Varner-Bass could not sue Golden Peanut in 1990 or 1991 because they were highly leveraged and hence compelled to accept the payments. In this action plaintiffs contend that they accepted the $875 per ton price for quota peanuts and the floor price for additional peanuts merely as partial payment of the total amount due.

Plaintiffs' complaint alleges that Golden Peanut breached the parties' contracts by refusing to allow plaintiffs to lock in a higher market price for peanut crops in 1990 and, as a result, that Golden Peanut grossly underpaid them. After hearing the evidence, the jury returned a verdict in favor of plaintiffs and awarded compensatory damages and interest for the quota peanuts and additional peanuts, as well as attorney fees for Golden Peanut's bad faith.

On appeal, Golden Peanut enumerates two errors with respect to the jury charge given by the court and argues that the court erred in denying its motions for directed verdict and j.n.o.v. Because our decision regarding the jury charge on accord and satisfaction is dispositive of the case, we will address it first.

Appendix B

1. In its answer to the complaint, Golden Peanut raised the affirmative defense of accord and satisfaction. At trial, Golden Peanut requested two pattern jury instructions on the subject, the charges found on page 24 of the Suggested Pattern Jury Instructions, Vol. I, Civil Cases. The trial court gave only one of the two charges requested by Golden Peanut, defendant's request to charge number 20, which is part A of the pattern charge on accord and satisfaction:

> When a new agreement takes the place of an old one, this ends the old agreement. The legal words for such an end to an old agreement are accord and satisfaction. It takes place where the parties satisfy one agreement by making and carrying out a new one; where they expressly agree that the new one takes the place of the old; or where there is a new consideration for a new promise in place of the old one.

Despite Golden Peanut's written request, the court declined to give its second requested charge on the subject, defendant's request to charge number 21, which is part B of the pattern charge:

> When a party makes an offer of a certain sum to settle a claim, the amount of which is the subject of a bona fide dispute, with the condition that the sum offered, if taken at all, must be received in full satisfaction of the claim, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction.

Appendix B

Although we are most reluctant to disturb any jury's verdict, and especially a verdict rendered after a lengthy and expensive trial, we conclude that court's failure to give request number 21 was reversible error.

> It is the duty of the court to charge the jury on the law as to every controlling, material, substantial, and vital issue in the case. Where the court fails to give the benefit of a theory of the defense which is sustained by the evidence, a new trial must be granted.

Pritchett v. Anding, 168 Ga. App. 658, 663(6) (310 SE2d 267) (1983).

After a verdict and judgment, an appellate court must construe the evidence with every inference and presumption in favor of upholding the verdict in the face of motions for a new trial or motions for j.n.o.v. See, e.g., *Cohen v. Lowe Aviation Co., Inc.*, 221 Ga. App. 259 (470 SE2d 813) (1996). On the other hand, when we decide whether a jury instruction should have been given, we do not allocate inferences and presumptions but merely exa mine the record to see if evidence was presented which created a substantial, material, and controlling issue in the case. See generally, *Pritchett*, supra at 663; *King v. Luck Illustrating Co.*, 21 Ga. App. 698 (94 SE 890) (1918). The test for whether such an issue was created is whether the evidence, if believed by a jury in accordance with the disputed jury instruction, would have affected the outcome. It is also necessary to decide whether the law given in the disputed charge was adequately explained by other portions of the trial court's instruction.

Appendix B

In the case at bar, if the court's giving of part A of the pattern charge, defendant's request to charge number 20, adequately explained the defense, then no error would exist from the court's failure to give part B of the pattern charge, defendant's request to charge number 21. There is no requirement "that [a] court instruct in the exact language of the request, even though the request may be correct as an abstract principle which is directly applicable to a material issue." *Harper v. Samples*, 164 Ga. App. 511, 514-15 (298 SE2d 29) (1982), quoting *Seagraves v. ABCO Mfg. Co.*, 121 Ga. App. 224, 226 (173 SE2d 416) (1970).

We will first discuss whether the evidence made the disputed charge "directly applicable to a material issue" and then discuss whether the requested charge was redundant in view of the court's having given part A of the pattern charge.

There was evidence of a dispute between the parties as to the final price, which dispute, according to Golden Peanut's evidence, lasted from July through mid-October of 1990. Neon Earl Bass, Jr., and John Varner, principals of the corporate plaintiffs, testified that representatives of Golden Peanut and plaintiffs disagreed over the price, and Jerry Adams, a banker who loaned money to plaintiffs, testified without objection that Bass and Varner told him about the dispute concerning the 1990 crops. Likewise, Coan, Golden Peanut's president, testified that the parties disagreed about the final price of the peanuts. Further, in his opening statement, counsel for plaintiffs referred to several disagreements between the parties in September and October. *John H. Smith, Inc. v. Teveit*, 175 Ga. App. 565, 567(1) (333 SE2d 856) (1985) ("Statements of counsel during the trial of a case may be regarded as admissions in judicio").

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Next, there is evidence that Coan made a final offer to plaintiffs to settle the claim during a telephone conversation with Varner and Bass in mid-October. Bass testified that following the "pretty heated conversation," Coan said: "I'm tired of negotiating with y'all. You're going to take 875 and be happy with it, and that's the deal. You are not going to get anything on the additionals." According to Varner, there was "no question" that Coan said, "you're going to take it, you're going to be happy. I'm going to pay you the floor price on the additionals. I'm going to pay you 875 on the quotas, and we are going to stop talking about 1990."

The evidence further demonstrates that Golden Peanut tendered the payment offered by Coan, and plaintiffs accepted that payment. Both Bass and Varner testified that they never attempted to lock in a different price for the 1990 crops with Golden Peanut. Accordingly, despite plaintiffs' contention that they believed that the amount tendered by Golden Peanut was merely a partial payment, we find that the evidence warranted the rejected jury charge on accord and satisfaction. The next jury may believe the defendant's evidence, or it may believe the plaintiffs' argument that no good faith dispute existed, and no offer to settle was ever made. We cannot weigh the evidence nor predict the outcome. But it is clear that the rejected jury charge was adjusted to the evidence.

Plaintiffs argue that the error, if any, was harmless, because the refused charge was substantially covered by the charge given. We disagree.

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The jury was given part A of the pattern charge on accord and satisfaction. According to the official note to that paragraph, the charge is a restatement of OCGA § 13-4-101 "in simplified form." The first sentences of the charge would be applicable to all accords and satisfactions. They are, like novations, new contracts substituted for old. See 6 *Corbin on Contracts*, § 1293, p. 189 (1962). But an existing contract can be discharged pursuant to OCGA § 13-4-101 only where there is an express agreement to a satisfaction or new consideration. See, e.g., *Fowler v. Gorrell*, 148 Ga. App. 573 (251 SE2d 819) (1978); *Wood v. Wood*, 239 Ga. 120 (236 SE2d 68) (1977); *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260 (228 SE2d 146) (1976). There does not appear to have been any new consideration. Moreover, neither party claims that there was ever an express agreement that a new arrangement existed which would satisfy the claims of Varner-Bass to a higher price. There are numerous decisions interpreting OCGA § 13-4-101 which stress the necessity for a "meeting of the minds." See, e.g., *Fowler*, supra; *Clark Equip. Credit Corp. v. Refrigerated Transp. Co., Inc.*, 148 Ga. App. 405 (251 SE2d 321) (1978); *First National Bank of Gainesville v. Appalachian Indus., Inc.*, 146 Ga. App. 630 (247 SE2d 422) (1978). Whatever the confusing and much contested trial evidence does show, it fails to show a meeting of the minds.

By contrast, part B of the pattern charge, which the court declined to give, describes a non-statutory form of accord and satisfaction, having a different lineage than part A, and being more closely adjusted to the evidence at trial. The precise language of the charge first appeared in 1921 in *J.L. Riley & Co. v. London Guar. & Accident Co.*, 27 Ga. App. 686 (109 SE 676) (1921), relying on similar language

in the seminal decision of *T.B. Redmond & Co. v. Atlanta & Birmingham Air Line Railway*, 129 Ga. 133 (58 SE 874) (1907). *T.B. Redmond* relied on decisions from other American jurisdictions and on language in the earlier Georgia case of *Hamilton v. Stewart*, 105 Ga. 300 (31 SE 184) (1898). In the 1898 decision Justice Cobb asserted that:

> Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon the condition stated, the party receiving it cannot retain the property and repudiate the condition.

Hamilton, supra at 302.

Significantly, part B requires no meeting of the minds. The satisfaction occurs by operation of law if the claimants keep the payment knowing of the implied condition. We have held that a creditor's acceptance of such a conditional payment extinguishes the disputed debt, "notwithstanding the fact that [the creditor] protests at the time that the remainder of the account is still due and owing." *Chrietzberg v. Kristopher Woods, Ltd.*, 162 Ga. App. 517, 518 (292 SE2d 100) (1982). Accord *Collins v. Commercial Union Ins. Co.*, 154 Ga. App. 450, 451 (268 SE2d 685) (1980); *T.B. Redmond*, supra at 141 ("notwithstanding any protest he may make to the contrary"). The Georgia rule on this matter is in accord with the general view in common law jurisdictions. See, e.g., *Frank Culver Electric, Inc. v. P.O. Jorgenson*, 136 Ariz. 76 (664 P.2d 226) (1983); *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*, 116 Wis. 2d 95 (341 N.W.2d 655) (1984). See generally, Restatement (2d) of Contracts, § 281.

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The plaintiffs deny that any conditions were stated when the payment of approximately $900,000 was made by Golden Peanut in October, 1990. They are correct that no notation on the check said "payment in full" and that no accompanying paperwork stated conditions. Furthermore, the plaintiffs are correct that the document labeled "Varner-Bass Settlement Report," which accompanied the payment, is not necessarily determinative because all payments were accompanied by similar "settlement reports." But the testimony of Coan and that of Varner and Bass raise jury issues as to whether the telephone conversation of mid-October was an offer to settle and whether the payment was accompanied by the requisite implied condition.

The plaintiffs contend that their acceptance of the $900,000 payment, and their later acceptance of $875 per ton for new deliveries of quota peanuts and of the floor price for additional peanuts did not constitute an acceptance of Coan's offer to settle but were merely acceptances of partial payments of the total amount due to them. Their assertions, even if true, would not avail them if a *bona fide* dispute existed and if Coan did in fact attach the requisite condition to the payments. Even a partial payment admittedly due will extinguish the whole debt if a *bona fide* dispute exists, and the offeror makes the payment conditional on its acceptance being a satisfaction. *J.L. Riley & Co.*, supra at 687, citing, e.g., *Chicago M. & S.P.R. Co. v. Clark*, 178 U.S. 353, 367 (44 LEd 1099, 20 SC 924) (1900). But if no *bona fide* dispute exists, then acceptance of a partial payment does not work a satisfaction. *J.L. Riley & Co.*, supra, citing *Alfred Struck Co. v. Slicer*, 23 Ga. App. 52, 55 (97 SE 455) (1918). Ultimately, whether a *bona fide* dispute existed in mid-

October and whether the payments were made conditionally were questions for the jury. But it is clear that part A of the pattern charge did not adequately cover the issues raised by the evidence. The failure to give part B of the pattern charge deprived Golden Peanut of defenses fairly raised by the evidence.

2. Although no issue is raised on appeal concerning whether Golden Peanut's objection to the trial court's failure to give its request to charge number 21 was sufficient to preserve this issue for appellate review, our research has disclosed conflicting opinions on what is necessary to preserve objections to the trial court's failure to give a written request to charge. For instance, we have held on several occasions that grounds for objection to the failure to give written requests to charge need not be stated at the conclusion of the charge; it is enough if the party voices an objection or exception and simply refers to the number of the requested charge. See *Kres v. Winn-Dixie Stores, Inc.*, 183 Ga. App. 854, 856(3) (360 SE2d 415) (1987) (whole court); see also *Robinson v. Metropolitan Atlanta Rapid Transit Auth.*, 197 Ga. App. 628(1) (399 SE2d 252) (1990); *City of Dalton v. Smith*, 210 Ga. App. 858, 860(5) (437 SE2d 827) (1993) (dictum).

However, there are other decisions of this Court which have held that a litigant must distinctly state the grounds for objection after the trial court fails to give a written request to charge in order to preserve the issue for appellate review. See, e.g., *Mays v. Farah U.S.A., Inc.*, 236 Ga. App. 1, 2(2) (510 SE2d 868) (1999); *First Union Nat. Bank v. Cook*,

223 Ga. App. 374, 377-378(6) (477 SE2d 649) (1996).[1] These decisions parallel those of federal courts interpreting Federal Rule of Civil Procedure 51, a rule which also requires that an objection and the grounds thereof must be stated after the trial court has instructed the jury. See, e.g., *Affiliated FM Ins. Co. v. Neosho Const. Co.*, 192 F.R.D. 662 (D.Ka. 2000).

Many of our panel decisions trace their ancestry to *Lissmore v. Kincade*, 188 Ga. App. 548, 551(4) (373 SE2d 819) (1988), which has not been expressly overruled. However, *Lissmore* relied on *U.S. Security Warehouse, Inc. v. Tasty Sandwich Co.*, 115 Ga. App. 764(1) (156 SE2d 392) (1967), which was expressly disapproved by the Supreme Court in *Continental Casualty Co. v. Union Camp Corporation*, 230 Ga. 8, 14-17(2) (195 SE2d 417) (1973), and on *Georgia Power Co. v. Maddox*, 113 Ga. App. 642, 643-646(1) (149 SE2d 393) (1966), which was disapproved and overruled by the Supreme Court in *Christiansen v. Robertson*, 237 Ga. 711, 712 (229 SE2d 472) (1976).

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1. Accord *Adams v. MARTA*, 246 Ga. App. 698 (SE2d) (2000), *K-Mart Corporation v. Lovett*, 241 Ga. App. 26 (525 SE2d 751) (1999), *Gay v. Hatfield*, 237 Ga. App. 826 (516 SE2d 856) (1999), *Alpha Beta Dickerson Southeastern v. White Co.*, 235 Ga. App. 273 (509 SE2d 351) (1998), *Evans Toyota, Inc. v. Cronic*, 233 Ga. App. 318 (503 SE2d 358) (1998), *Anderson v. State*, 231 Ga. App. 807 (499 SE2d 717) (1998), *Bedeski v. Atlanta Coliseum, Inc.*, 224 Ga. App. 435 (480 SE2d 881) (1997), *General Accident Insurance Co. v. Straws*, 220 Ga. App. 496 (472 SE2d 312) (1996), *James v. Tyler*, 215 Ga. App. 479 (451 SE2d 506) (1994), *Roswell Properties, Inc. v. Salle*, 208 Ga. App. 202 (430 SE2d 404) (1993), *Kittles v. Kittles*, 187 Ga. App. 537 (370 SE2d 803) (1988), and *Carpet Transport, Inc. v. Dixie Truck Tire Company*, 185 Ga. App. 181 (363 SE2d 840) (1987).

Moreover, all of the decisions following *Lissmore* and *U.S. Security Warehouse* are panel decisions which seem to be in conflict with our controlling, unanimous, whole court decision in *Kres*. See OCGA § 15-3-1(d) ("a decision concurred in by all the judges shall not be overruled or materially modified except with the concurrence of all the judges").

In the seminal decision of *Continental Casualty*, supra, the Supreme Court expressly rejected the federal rule and made a distinction between subsections (a) and (b) of Code Ann. § 70-207, now OCGA § 5-5-24. The Court stated that objections to the charges which the trial judge did give are governed by subsection (a); therefore, a litigant must state distinctly the grounds for an objection to the charge as given. Id. at 16. By contrast, the Court stated expressly that subsection (b), and not subsection (a), governs how written requests to charge will be "handled" by a trial court. The Supreme Court noted that subsection (b) makes no mention of objections. Id. It then concluded that a mere objection to the trial court's refusal to give a requested written charge, without restating the grounds, is adequate to preserve the issue for appeal. Writing for the majority, Justice Hawes reasoned as follows:

> [N]o useful purpose could possibly be served by requiring that the grounds upon which counsel contend the charge should be given be repeated after the court has announced to counsel its decision that the requested charge will not be given and has instructed the jury omitting such requested charge. After the charge has been given, to require a restatement of grounds of objection to the refusal

> to charge timely submitted written requests would be putting form ahead of substance — a result we should always endeavor to avoid.

Continental Casualty, supra at 17.

The *Continental Casualty* opinion expressly holds that a party which has submitted a written request to charge need not "restate," after the court has instructed the jury, the grounds for the party's objection to the court's omission of the requested charge. Justice Hawes, speaking for the Court, thus implies that the reason has already been stated to the trial judge. The opinion argues that "the court normally affords such party at that time [i.e. when the charges are submitted] an opportunity to state the grounds. . . ." Id. at 16. The opinion does not address whether the charge conference must be reported or whether the grounds must appear somewhere in the record.

The otherwise clear decision in *Continental Casualty* does make a confusing distinction between a trial court's *failure* to give a charge and its *refusal* to give a requested charge. Id. at 16. The opinion states that subsection (a) of the code section "relates to the manner in which a party may complain of the giving or the *failure* to give an instruction to the jury." (Emphasis in original.) Id. The opinion then states that subsection (b) relates to the manner in which written requests shall be submitted and handled by the court. The opinion pointed out that, unlike subsection (a), subsection (b) contains no provision relating to objections to the *refusal* to grant requests to charge. Id.

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The confusion between *failure* and *refusal* to give a charge was eliminated by *Kres v. Winn-Dixie Stores, Inc.*, supra, a 1987 unanimous whole court decision, where Judge Carley (now Justice Carley) parenthetically modified "failure" with the words "without request." 183 Ga. App. at 856. The whole court decision quoted with approval *Roberson v. Hart*, 148 Ga. App. 343, 344(1) (251 SE2d 173) (1978), where it was explained that

> "(a)lthough past decisions may suggest that objections to the court's refusal to charge as requested are controlled by the same rule governing objections to the failure to charge (without request) or objections to the charges as given ([cits.]), the Supreme Court has held otherwise."

Kres, supra at 856-857. Thus, *Continental Casualty*, as interpreted by our controlling whole court decision, stands for the proposition that subsection (a) of the applicable code section governs objections to a court's having given a particular charge or its failure to give an unrequested charge, and subsection (b) governs objections to the court's refusal to give a properly requested written charge. The holdings of *Continental Casualty* and *Kres*, taken together, provide that all objections regarding a jury charge must be made on the record after the jury has been instructed, but that objections made after the charge to the court's refusal to give a timely requested written charge need not be accompanied by the grounds for the objection.

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Because we are bound by the Supreme Court decision of *Continental Casualty* and by our unanimous, whole court decision in *Kres*, it appears that *Adams v. MARTA*, 246 Ga. App. 698 (SE2d) (2000), *K-Mart Corporation v. Lovett*, 241 Ga. App. 26 (525 SE2d 751) (1999), *Gay v. Hatfield*, 237 Ga. App. 826 (516 SE2d 856) (1999), *Mays v. Farah U.S.A., Inc.*, 236 Ga. App. 1 (510 SE2d 868) (1999), *Alpha Beta Dickerson Southeastern v. White Co.*, 235 Ga. App. 273(2) (509 SE2d 351) (1998), *Evans Toyota, Inc. v. Cronic*, 233 Ga. App. 318(3(a)) (503 SE2d 358) (1998), *Anderson v. State*, 231 Ga. App. 807(3(a)) (499 SE2d 717) (1998), *Bedeski v. Atlanta Coliseum, Inc.*, 224 Ga. App. 435(1) (480 SE2d 881) (1997), *First Union National Bank v. Cook*, 223 Ga. App. 374 (477 SE2d 649) (1996), *General Accident Insurance Co. v. Straws*, 220 Ga. App. 496(2) (472 SE2d 312) (1996), *James v. Tyler*, 215 Ga. App. 479(5) (451 SE2d 506) (1994), *Roswell Properties, Inc. v. Salle*, 208 Ga. App. 202 (430 SE2d 404) (1993), *Lissmore v. Kincade*, 188 Ga. App. 548 (373 SE2d 819) (1988), *Kittles v. Kittles*, 187 Ga. App. 537(5) (370 SE2d 803) (1988), and *Carpet Transport, Inc. v. Dixie Truck Tire Company*, 185 Ga. App. 181(2) (363 SE2d 840) (1987), and any like opinions, were incorrectly decided and should no longer be followed. We need not overrule *Georgia Power Co. v. Maddox*, 113 Ga. App. 642 (149 SE2d 393) (1966), as its gravamen was expressly overruled by a whole court decision of this Court in *A-1 Bonding Service, Inc.*, supra at 183 (Chief Judge Bell speaking for the Court in an "addendum" to the opinion). *Georgia Power Co.* was also expressly overruled in 1976 by the Supreme Court in *Christiansen*, supra.

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In the case at bar, counsel for Golden Peanut made his objections to the trial court's jury instructions using the two different techniques authorized by our whole court decision in *Kres* and by the Supreme Court in *Continental Casualty*. Counsel for Golden Peanut first made a minimalist, perfunctory objection to the court's *failure* to give the charges he had requested, to wit:

> MR. BENNETT: We object to the failure to give defendant's request to charge No. 21, 22, 23, 25, 26, 28.

He then went on, as required by OCGA § 5-5-24(a) to state more elaborate objections to the charges the court *did* give, stating the grounds for each objection, to wit:

> MR. BENNETT: We object to the Court instructing the jury that if a person willfully testifies falsely, that they are required to disregard or shall disregard the remainder of their testimony unless corroborated. The jury has discretion to determine . . . or accept any part of a witness' testimony.
>
> I object to the burden of proof charge on confidential relations, not only in imposing the burden on the defendant, but the charge as written suggested to the jury as if the Court were commenting on the evidence in that we had failed to read the agreement.
>
> We object to the Court charging that the agreement on additional peanuts is legally enforceable. . . .

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The minimalist objection by Golden Peanut to the failure to give timely submitted written requests to charge was adequate to preserve the objection according to *Continental Casualty.* Significantly, in that case, appellant's counsel did not even mention the numbers of the refused charges. The precise objection which was held to have been adequate to preserve the issue was the following: "Your Honor, I object to the failure of the court to charge those charges that I gave that the court did not give." *Continental Casualty*, supra at 15.[2] The objection obviously fails to state the grounds of the objection, and the Supreme Court used the opportunity expressly to disapprove our holding in *U.S. Security Warehouse, Inc. v. Tasty Sandwich Co.*, supra, "and all other cases to a like effect." *Continental Casualty*, supra at 17.

Similarly, *Kres* held that an alleged error was preserved for appeal by counsel merely objecting "to the Court's failure to charge [her] Request to Charge [Number 15]. . . ." Id. at 856(3). Accord, *Robinson v. Metropolitan Atlanta Rapid Transit Auth.* supra at 628(1); *City of Dalton v. Smith*, supra at 860(5) ("unnecessary for a party to state grounds of objection"). The decision in *Kres* was concurred in by all nine judges then on our Court. However, the *Kres* decision was not mentioned by the later panel decisions of *Carpet Transport* (1987), *Kittles* (1988), *Lissmore* (1988), *Roswell Properties* (1993), *James* (1994), *General Accident Ins. Co.* (1996), *First Union* (1996), *Bedeski* (1997), *Anderson* (1998), *Alpha Beta Dickerson* (1998), *Evans Toyota* (1998), *Gay* (1999), *Mays* (1999), *K-Mart* (1999), and *Adams* (2000). See OCGA

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2. The parties stipulated that a general objection was sufficient "basis for the record" without reading the request into the record.

§ 15-3-1(d) ("A decision concurred in by all the Judges shall not be overruled or materially modified except with the concurrence of all the Judges").

Although we find that Golden Peanut did all that it was required to do to preserve its objections to the trial court's refusal to give its written requests to charge, this does not end our consideration of this issue. Both *Continental* and *Kres* are premised on the rationale that it is unnecessary for litigants to state their grounds for objections to the trial court's failure to give their written requests to charge at the conclusion of the charge because they have already done so. Thus, *Continental* states that the ground of objection need not be "*restated.*" *Continental*, supra at 17. This obviously implies that the reason has already been stated to the trial judge. And *Kres* states "[t]hus, where the trial court refused to instruct the jury in accordance with a timely submitted written request, in order to secure review of that action on appeal it is unnecessary for the party to state grounds of objection to such refusal at the conclusion of the charge. *It is only necessary that the refusal to charge be objected to at some point.*" (Citations and punctuation omitted.) *Kres*, supra at 856-857. As *Continental Casualty* explains, the requirements of OCGA § 5-5-24(b) that the charges be submitted to the court and served on the opposing party affords the trial court "every opportunity to be informed as to the contentions of the respective parties concerning such request." 230 Ga. at 17. Moreover, the statute requires the trial court to inform the parties of its proposed action upon the requests prior to argument.

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Neither *Continental Casualty* nor *Kres* requires that these pre-charge objections or discussions appear on the appellate record. Obviously, if the requested charge is a pattern charge, such as the one in the case at bar, or otherwise embodies a well-established principle of law, the argument urged to the court in support of giving the charge might itself be quite minimal. When the request is a pattern charge approved by the Council of Superior Court Judges, a citation to the book of Suggested Pattern Jury Instructions, placed at the bottom of the written request should suffice to alert the trial court to counsel's contention that the requested instruction is valid law in Georgia. Similarly, a party's submission of a written charge is an assertion that counsel believes that the requested instruction is adjusted to the evidence presented at trial. Nothing else should be needed to preserve for appeal an objection to the court's refusal to give such a charge except, of course, a reminder to the trial judge after the judge has instructed the jury that the party still objects or excepts to the charge not having been given. As explained by the Supreme Court of a neighboring state, we should not require "that the objecting party, in order to preserve for review erroneous jury instruction, . . . deliver a discourse before the trial judge on the applicable law of the case." *Gardner v. Dorsey*, 331 So.2d 634 (Ala. 1976).

On the other hand, there are other cases involving charges on novel points of law, in which a record of what transpired below would greatly aid this Court in deciding the issue on appeal. In novel cases, it would be helpful for counsel to cite on the record what authority supports the validity of the legal point made in the requested charge and precisely which evidence at trial makes the legal point applicable. Moreover,

this comports with our general rule of appellate procedure that we will not consider grounds on appeal which are different from those urged below, and this rule pertains to objections to charges as well as other trial matters. See, e.g., *City of Dalton*, supra at 858-859(1).

Thus, the better practice, and the one we would urge the litigants and courts of this state to follow, is that the grounds of objection, i.e. the reasons urged for the requested charge, should be placed somewhere on the record, although all that is needed after the charge is a perfunctory objection identifying the omitted requested charge. And while the record need not be made with any particular formality, enough should appear so that the reviewing court can ascertain the grounds urged below.

3. While we conclude that the court erred in not giving the pattern jury charge on the theory of accord and satisfaction, we reject Golden Peanut's contention that the court erred in denying its motions for directed verdict and j.n.o.v. on that issue.

It is well settled that the standard of appellate review of the denial of both a motion for directed verdict and a motion for j.n.o.v. is the any evidence test. *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.*, 230 Ga. App. 455, 456(2) (496 SE2d 546) (1998).

> The question before this court is not whether the verdict and the judgment of the trial court were merely authorized, but is whether a contrary judgment was demanded. A judgment n.o.v. is

> properly granted only when there can be only one reasonable conclusion as to the proper judgment; if there is any evidentiary basis for the jury's verdict, viewing the evidence most favorably to the party who secured the verdict, it is not error to deny the motion.

(Citations omitted.) Id. See also *Ruben's Richmond Dep't Store v. Walker*, 227 Ga. App. 867 (490 SE2d 536) (1997); *Professional Consulting Servs. of GA., Inc. v. Ibrahim*, 206 Ga. App. 663, 665(1) (426 SE2d 376) (1992).

Based on this standard, we conclude that there was evidence to support the rejection of Golden Peanut's accord and satisfaction defense and that the trial court properly denied the motion for directed verdict and submitted the case to the jury. Likewise, because there was an evidentiary basis for the jury's verdict, the court properly denied the motion for j.n.o.v.

4. Next, Golden Peanut argues that the court erred in denying its motions for directed verdict and j.n.o.v. as to plaintiffs' additional peanuts, alleging that plaintiffs' theory of recovery violates a federal statute and its implementing regulations. We note that the court's denial of the motions must be upheld if there is any supporting evidence and conclude that the court did not err. See *Pulte Home Corp.*, supra at 456.

According to the statute in force in 1990, 7 U.S.C. § 1359(a) (1988), additional peanuts could only be marketed through contracts that complied with federal regulations.

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The applicable regulations required that "the final contract price" of the additional peanuts appear on the contract, and that the contract contain a prohibition against changing the price. 7 C.F.R. § 1446.107(a)(7), (12) (1990). In order for a contract to be approved, the contract price for additional peanuts must have been "expressed in such a manner that a third party may determine . . . the actual price of the peanuts without a need for additional negotiations." 7 C.F.R. § 1446.108(a) (1990). In 1990, contracts for additional peanuts had to be submitted to the local ASCS office by July 31. 7 C.F.R. § 1446.107(a).

Golden Peanut argues that the contracts at issue failed to comply with the applicable federal regulations because they did not specify a final price for additional peanuts other than the stated "floor price," nor did they contain a formula by which a third party could determine the higher price. Thus, the additional peanuts could not have been purchased for a price higher than that specified in the contract. According to Golden Peanut, plaintiffs' theories of recovery based on an alleged agreement that they could pick a market price at any time during the year were illegal and unenforceable. We reject this argument.

As a preliminary matter, we note that the three *amici* are correct that federal regulation of the production and marketing of peanuts is supreme, and we are in no way contesting or diminishing the federal authority to regulate the peanut industry. If Georgia sought to regulate any aspect of the production and marketing of peanuts, the applicable federal regulations would preempt the state legislation and render it

void. See generally, *Gentry v. Volkswagen of America, Inc.*, 238 Ga. App. 785, 786-787(2) (521 SE2d 13) (1999). But Georgia has not attempted to regulate the peanut industry. It is clear that the federal regulatory scheme contemplates the sale of peanuts, and it is certainly foreseeable that disputes over contracts for the sale of peanuts would be resolved in state court in accordance with state law. The federal regulations do not expressly provide that a contract that is not in accordance with the regulations is necessarily void. Thus, we turn to Georgia law to determine whether the contracts required illegal conduct and were therefore unenforceable.

The contracts were negotiated by the parties and were actually prepared on a form supplied by Golden Peanut. Because Golden Peanut was one of the largest peanut shellers in the industry, it might be presumed that Golden Peanut was familiar with the applicable federal regulations. We are therefore troubled by one who negotiated a contract that it knew, or should have known, violated federal regulations subsequently attempting to evade its performance of that contract by claiming that the contract violated those regulations.

Regardless, while Georgia law dictates that a court cannot enforce a contract "to do an immoral or illegal thing," we do not find that the contracts in the case sub judice required illegal conduct. See OCGA § 13-8-1; *Moore v. Dixon*, 264 Ga. 797 (452 SE2d 484) (1994). See also *Adams v. Trust Co. Bank*, 206 Ga. App. 554 (426 SE2d 36) (1992); *Golden Peanut Co. v. Hunt*, 203 Ga. App. 469 (416 SE2d 896) (1992).

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Our recent decision, cited by *amicus, Maner v. Chatham County*, 246 Ga. App. 265 (SE2d) (2000), is distinguishable. In that case, a defendant successfully escaped compliance with its contractual obligations because the county employee who made the promises lacked authority to enter into contracts on the county's behalf and also because the promises required violation of explicit state statutes involving police officers and public safety. By contrast, the three *amici* ask this court to deny enforcement of a contract negotiated between experienced business persons on the ground that the contract violated technical aspects of complex federal regulations regarding price specification in contracts for the sale of farm products. If the contracts were executory, we might be inclined to leave the parties as we find them. But the contracts in dispute have been performed, tens of thousands of tons of peanuts have been delivered, and the remaining dispute concerns only price. The farmers were entitled at least to *quantum meruit*.

Furthermore, the evidence does not preclude a finding that the contracts complied with federal regulations. First, we recognize that nine ASCS offices independently approved the contracts as complying with federal regulations. At a minimum, there was evidence to support plaintiffs' contention that the parties had agreed to a method for determining the final price of additional peanuts by locking in a market price later in the year. Accordingly, we conclude that the court did not err in denying Golden Peanut's motions for directed verdict and j.n.o.v. as to the additional peanuts.

5. Golden Peanut assigns error to the court's denial of its motion for j.n.o.v., based on its contention that the jury impermissibly relied on parol evidence of the parties' alleged

agreement to lock in a price later in the year. Golden Peanut argues that evidence of an alleged oral agreement reached before the contracts were executed was barred by the contracts' merger clause.

As a preliminary matter, we recognize that Golden Peanut failed to object to the admission of parol evidence at trial and actually introduced its own parol evidence. Golden Peanut's failure to object acts as a waiver of this argument on appeal. *Franklin v. Towe*, 233 Ga. 950(3) (213 SE2d 892) (1975). Likewise, Golden Peanut's introduction of parol evidence waived any argument it might have regarding plaintiffs' parol evidence. See *Williams v. Memorial Med. Ctr., Inc.*, 218 Ga. App. 107, 108(2) (460 SE2d 558) (1995).

For purposes of retrial, we note that it is well settled that parol evidence is admissible to explain ambiguities in a written agreement. OCGA §§ 24-6-3(b) and 13-2-2(1); *Empire Distributors, Inc. v. George L. Smith II Georgia World Congress Ctr. Auth.*, 235 Ga. App. 742, 744 (509 SE2d 650) (1998). "Parol evidence is admissible to explain all ambiguities, the question as to what was intended being an issue of fact for the jury." (Citation omitted.) *Alpha Beta Dickerson Southeastern, Inc. v. White Co.*, 235 Ga. App. 273, 275(1) (509 SE2d 351) (1998).

In the case sub judice, plaintiffs introduced parol evidence of the parties' agreement to lock in a higher price later in the year to explain the meaning of the term "floor price" in the contracts. Because parol evidence is admissible to complete an agreement, the court did not err in allowing the jury to consider it. See *Preferred Risk Mut. Ins. Co. v. Jones*,

233 Ga. 423, 424-425(1) (211 SE2d 720) (1975). Furthermore, evidence of the agreement to lock in a price was not inconsistent with or contradictory to the written contracts. Compare *Golden Peanut Co. v. Hunt*, supra at 471.

6. Finally, Golden Peanut argues that the court erred in charging the jury on OCGA § 11-2-305(3), which provides: "When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party[,] the other may at his option treat the contract as canceled or himself fix a reasonable price." Golden Peanut contends that the charge was inapplicable to the evidence and misled the jurors by leading them to believe that Golden Peanut's refusal to pay the disputed amount gave plaintiffs the right to fix a price bearing no relationship to the contracts. See *John D. Robinson Corp. v. Southern Marine & Indus. Supply Co.*, 196 Ga. App. 402, 408-409 (395 SE2d 837) (1990).

There was evidence, however, that the parties had agreed to a method for arriving at a price, by which plaintiffs would lock in a market price during the year. There is at least some evidence that Golden Peanut prevented plaintiffs from locking in a price and, thus, caused the "floor price" agreement to fail. At a minimum, the evidence presented a jury question as to the fault of Golden Peanut.

Golden Peanut relies on a Seventh Circuit case for the proposition that the charge at issue applies only when some action by the parties is required to enable a third party or external agency to set the price in accordance with the agreement. *Weisberg v. Handy & Harman*, 747 F.2d 416, 420 (7th Cir. 1984). However, Golden Peanut has cited no

Georgia case to support its argument, and our research reveals none. Moreover, OCGA § 11-2-305(3) is silent as to third parties. Because it is the duty of the court to charge the jury on the law as to every issue in the case which is even minimally sustained by the evidence, we cannot conclude that the court erred in charging the jury on this issue. *Pritchett*, supra at 663.

Judgment reversed. Blackburn, C.J., Johnson, P.J., Eldridge and Ellington, JJ., concur. Pope, P.J., Smith, P.J., Ruffin, Barnes and Miller, JJ., concur and concur specially as to Division 2. Andrews, P.J., concurs and concurs specially as to Division 3. Phipps, J., not participating.

ANDREWS, Presiding Judge, concurring specially.

Although I concur fully in Divisions 1, 2, 4, 5, and 6, I must concur specially as to Division 3 because I believe Golden Peanut (Golden) was entitled to a directed verdict on the issue of accord and satisfaction.

As set out in the majority, it is not disputed that in October 1990, Coan, on behalf of Golden, told Bass and Varner that $875 per ton on the quota peanuts and the floor price on the additional peanuts was all that Golden was going to pay and there would be no further discussion of the 1990 peanuts. It is also undisputed that, after this declaration by Coan, Varner-Bass was sent, received, and cashed over $900,000 in payments based on the $875 per ton quota peanuts and floor price per ton additional peanuts. As Bass testified, "we had to take it. We couldn't turn down any checks." Varner estimated that his and Bass' personally

guaranteed debt for Varner-Bass was approximately $36 million and they did not refuse the money paid by Golden or make any protest at that time that additional monies were owed on the 1990 peanuts.

The later protest, made by instituting this litigation and contending in response to Golden's motion for directed verdict and j.n.o.v. that the payments were accepted only as an advance on a larger sum, was unavailing. *Redmond & Co. v. Atlanta &c. Railway*, 129 Ga. 13, 136 (58 SE 874) (1907) (acceptance of money due to great financial distress does not prevent accord and satisfaction); *Hamilton & Co. v. Stewart*, 105 Ga. 300, 302 (31 SE 184) (1898); *M. Walter & Co. v. North Highland Assembly of God*, 188 Ga. App. 852 (374 SE2d 792) (1988).

Therefore, I believe Golden was entitled to a directed verdict or j.n.o.v. on the defense of accord and satisfaction. See *Gary v. E. Frank Miller Construction Co.*, 208 Ga. App. 73, 75(2) (430 SE2d 182) (1993).

MILLER, Judge, concurring specially.

I concur fully with the result reached by the majority, but write specially with regard to Division 2. In assessing any error in the failure of the trial court to give a written request to charge, our main concern is whether at *some* point the grounds for the objection have been given on the record. Of course if the grounds were given prior to the charge to the jury, and this court has those grounds of record, there is no requirement that they be restated, and this court can review the error after determining whether those same grounds are

argued on appeal. It is well established that review of the charge enumerated is limited to the ground of objection stated at trial.[3] In summary, my view is that the proper method of making an objection to a requested charge that was not given is to state that objection and the charge, and then state the legal basis. As a practical matter, this gives the trial judge a final opportunity to evaluate whether the grounds given require the giving of the charge, or whether an additional charge should be given prior to the jury beginning its deliberations. This will assist in maintaining the integrity of the verdict and eliminate the need for appeals on this issue.

I am authorized to state that Presiding Judge POPE, Presiding Judge Smith, Judges Ruffin and Barnes join in this special concurrence

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3. *Benson v. Tucker*, 160 Ga. App. 217, 218(1) (286 SE2d 485) (1981).